No. 45769-5-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

In re the Marriage of

AMY S. DEVARGAS
Appellant

and

JOSHUA D. KLEYMEYER
Respondent

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

This case involves child support and is as muddled as they come. The original orders of support were entered in Oregon. The Washington court modified those and addressed back support claims from both parents. After two hearings, a commissioner declared the issues "complicated" and adjourned to consider them further. Six weeks later, he issued a letter ruling and an order of contempt, assessing back support against both parents. The commissioner did not resolve the many other issues presented until over a month later. In the meantime, the mother had filed a motion to revise the contempt order, which Judge Hirsch denied as untimely. For reasons that will be explained further, the order was not subject to revision, since it was, essentially interlocutory. If it was, the application of the ten-day revision time limit is unconstitutional as applied to the mother since she could not have known the order was entered. In any case, all these issues arose again after the commissioner entered a final order of child support and both parties moved to revise. Judge Lisa Sutton revised most issues in the father's favor and denied the mother revision, including on the issue raised in the premature motion to revise. In doing so, the judge made numerous legal errors, elaborated upon below, the essential facts being mostly undisputed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by finding the father to be "involuntarily unemployed" (but not unemployable) and basing his income on his dividend income and unemployment benefits and thereby reducing his child support obligation from $910 to $50 and imposing obligations on the parents at the ratio of 56-62% for the mother and 39-44% for the father, despite the father's wealth and the mother's near-poverty.

2. The mother requested a deviation on the basis of the father's household wealth and the additional children she supports in her household. The trial court erred by denying this request on the basis that "only the father's income is to be used in calculating any support obligation" and erred further by failing to consider the additional children in the mother's household.

3. The trial court erred by granting the father a deviation downward based on "split custody" without considering the effect of this deviation on the child remaining in the mother's household.

4. The trial court erred by ordering the mother to pay 56-62% of two-thirds of "all college related expenses" for the eldest child despite that she has few resources and her income is imputed at full-time

minimum wage and she supports three minor children in her home. CP 805, 821, 837.

5. The trial court erred by allowing the unemployed father a deduction of $417 a month for the voluntary contribution he makes to a Roth IRA.

6. The trial court erred by not holding the father accountable for his proportional share of legal fees expended by the mother on behalf of the their minor child.

7. The trial court erred by allowing the father a credit for the portion of health insurance expense paid to insure he and his wife, not the children.

8. The trial court erred by entering the following findings of fact and conclusions of law:

> 1.0 Contrary to the finding of the Court Commissioner, the Respondent was involuntarily unemployed. He qualified for unemployment benefits. Exhibit A attached to Petitioner's [DeVargas's] August 19, 2013 declaration, a January 26, 2012 letter from the Respondent's then employer, Rand [C]orporation, reads in part, "you confirmed that your physician has not released you to return to work and that you will not be ready to return to active employment in the near future. Therefore, we will proceed with the separation of your employment as previously communicated ..." Any employment technically ended January 27, 2012. He received unemployment benefits for the year 2012 and part of 2013.
>
> ...

1.6 … There is no showing in the record that she has attempted to become fully employed.

1. The father was involuntarily unemployed and his income for the purposes of determining support should be the unemployment benefits he received in the years 2012 and 2013.

2. The parties agreed that there was adequate cause for this matter to be heard—adequate cause being the change of residence of the oldest child. This became a split custody situation, one child residing in each respective parental household. The court has determined that it is fair and equitable to calculated [sic] support according to the Arvey case. The income of the Respondent father's spouse is not by law included in his income calculation.

3. There is no basis in case law or statute for the Respondent father to be found obligated to pay criminal defense fees for a child of a committed intimate relationship when a parentage decree has been filed years before those fees were incurred, the mother was the custodial parent of the child and the father did not assume an obligation for those fees.

4. A parent may be given a deduction for child support calculation purposes for voluntary Roth IRA contributions within statutory limits.

5. A parent who pays health care premiums that cannot be pro rated is entitled to a full credit for child support calculation purposes.

6. There is no basis in case law or statute for interest to be assessed for support payments determined subsequent to filing of a modification petition and before a modified support order is entered.

7. It is fair and equitable that a voluntarily under employed parent should be assessed post secondary support in proportion to her imputed income, the child being responsible for one third of costs and tuition, the parents

being responsible for the remaining two thirds in proportion to their incomes.

CP 789-792.

9. The trial court erred by entering the following orders:

1. The modified order of support herein entered January 7, 2014 shall be revised not imputing the father's historic income to him but attributing to him his income derived from unemployment benefits.

2. The modified order of support entered herein January 7, 2014 shall be revised and based on a split custody Arvey calculation for the time period when one child resided respectively in each parent's household. The income of the Respondent's spouse shall not be considered in establishing any obligation he may be said to have. He shall be obligated to pay support for the youngest child the period when the oldest child begins to attend college [sic].

3. The support order entered January 7, 2014 containing a judgment for $9,911.20 for legal fees incurred by the petitioner for criminal defense of the minor child [B.K.] is revised as follows: The judgment is vacated and stricken.

4. The modified order of support entered herein January 7, 2014 shall be revised allowing the father a $416.66 per month [sic] for a voluntary Roth IRA contribution.

5. The modified order of support entered herein January 7, 2014 shall be revised allowing the father the full heal [sic] care premiums he has claimed.

6. The Petitioner Mother's motion to revise re: assessment of back interest for support payments not ordered until January 7, 2014, payments determined after filing of modification petition, is denied.

7. Petitioner mother's motion to revise re: assessment of post secondary education is denied.

...

> 9. The modified support order language with regard to reimbursement for visitation travel expenses shall be unchanged.

CP 792-794.

10. The trial court erred by entering child support orders in accord with its findings and conclusions and orders. CP 795-809, 810-825, 826-841.

11. The trial court erred by holding the mother in contempt, including ordering the mother to reimburse the father for transportation expenses that he was held accountable for under the 2010 Oregon order, both because the court failed to identify the order obligating her, the order did not obligate her, and she had no ability to pay for these expenses.

12. The trial court erred by awarding fees in the contempt action without finding bad faith.

13. If the commissioner's contempt order was subject to revision, the trial court erred when it denied the motion for revision on the basis that it was untimely.

14. Mother moves for an award of attorney fees on appeal.

Issues Pertaining to Assignments of Error

1. Whether or not a parent was voluntarily or involuntarily terminated from his former employment, so long as he is employable, does he have a duty to support his children?

2. Where a parent is unemployed, but employable, and has an established historical rate of pay, does Washington law require income be imputed to him at that rate of pay?

3. If a parent's income is not imputed at his historical rate of pay, does Washington law require it be imputed according to census data, as provided in the statute?

4. Where a mother requests a deviation based on the father's household wealth, does Washington law require the court to consider all resources in the father's household, including the "substantial income" of his spouse and, where the court denies the deviation on the basis that it can only consider the father's actual income, does this legal error require reversal?

5. Where a mother requests a deviation based on the additional children she supports in her household, does the court commit reversible error when it fails even to consider the effect on those children of the reduction in monthly support to the mother's household?

6. In order to grant the father a downward deviation, does the court first have to determine whether the reduced support will result in insufficient funds in the mother's household?

7. Can the court order a parent to pay post-secondary educational support if the parent lacks the financial ability to do so?

8. Can a parent whose income is imputed at full-time minimum wage and who has no other significant assets be required to pay 56-62% of two-thirds of "all college-related expenses" for her oldest son to attend a private university?

9. Judge Sutton addressed the contempt order issue in her orders revising the commissioners January 7 ruling, when she addressed all other matters. Accordingly, is that issue properly raised in this appeal?

10. Was the order that mother was in contempt for failure to pay transportation and other expenses erroneous where that issue had been resolved in 2010 and mother was not responsible for those expenses, and the mother had no ability to pay?

11. Was the contempt order erroneous because it failed to identify what order the mother violated?

12. Could the court award fees in the contempt order where an award is limited to the obligee bringing an action in bad faith?

13. Where a commissioner deals with only one issue of many, issuing a letter ruling and a contempt order, is that order essentially interlocutory, which is how it was treated, and may the litigant seek revision on all matters at the same time, in the interest of avoiding piecemeal litigation?

14. If not interlocutory, is the time limit for filing a notice of revision unconstitutional as applied to the facts of this case, where a commissioner enters an order six weeks after the hearing, knowing that one of the parties' attorneys has withdrawn, and the court nevertheless sends a copy of the letter ruling to the attorney, so that the party does not know of the ruling and does not obtain a copy of the contemporaneously entered order until the day the time limit expires?

15. Where the mother makes minimum wage or less, supports three children in her household, and has no significant assets, and where the father can afford, in his unemployment, to make substantial monthly contributions to retirement, owns a home, has substantial investments and a trust fund, should the mother receive her fees on appeal?

III. STATEMENT OF THE CASE

Amy DeVargas and Joshua Kleymeyer have two sons, B.K. (age 18, d.o.b. 12/2/1995), and S.K. (age 16, d.o.b. 9/30/1997). Orders pertaining to parentage, custody and support were entered in Multnomah County, Oregon in 2000 and 2001. CP 428-432, 433-400. The original judgment included an order for an additional hearing so that Kleymeyer "can report upon his sincere and bona fide effort to meet the financial needs of the minor children," the court having ordered him to seek additional resources for the support of his children's "basic needs" from a

trust fund available to him. CP 435-436. The court noted in a letter that Kleymeyer "rarely works for a living" and had been less than forthcoming about the funds available to him, which were his apparent means of support. CP 439-440; see, also, CP 264-266.[1] The court said his "posture in this matter is absolutely baffling…" CP 338. The court said, while Kleymeyer "appears to be a very committed and devoted father at a relationship level," he "also appears absolutely unwilling to make use of resources available to him to provide his children with the basic necessities of life." CP 338.[2] The father maintained this position again in 2010, when he asked the court to disregard his trust funds when it determined his child support obligation. CP 377,

Later in 2001, the Oregon court permitted DeVargas to relocate with the children to Scotland, with her husband, a United Kingdom citizen. CP 428. The 2001 Oregon order provided that B.K. and S.K. would spend one month of each summer with Kleymeyer, with each parent to pay "one-half the cost for the children's transportation expenses

[1] For example, in 1999, it appears he was receiving $4984 monthly from the trust. CP 442.

[2] These facts are included, not because child support is a means to reward or punish parental conduct, but because the father's wealth was ignored by the court and his unfavorable characterizations of the mother seem to have influenced to the court. See, e.g., CP 376 (father accusing mother of being "content to be supported by others"); CP 791 (court making a point of the children being the product of a "committed intimate relationship" rather than a marriage).

for the summer visit." CP 430. For additional visits, Kleymeyer was made "solely responsible" for transportation expenses. CP 430.

While living in Scotland, DeVargas had two more children, who are now ages 12 and 10. CP 262. In April, 2009, DeVargas and all four children returned to the United States and settled in Olympia, Washington. CP 467.

Custody and support orders were modified again in Oregon on August 30, 2010, by agreement. CP 347-359. They had not been adjusted since 2001. CP 471. DeVargas's income was imputed at $1,455, she being unemployed at the time; Kleymeyer's income was $5,268. CP 349.

Though the father requested reimbursement for previously incurred transportation expense for the 2001-2009 period, the order does not award any. CP 377. Rather, the order declares "[f]ather will continue to pay all of the children's transportation expenses for his parenting time in the amount of not less than $3,600 per year." CP 349 (emphasis added); see, also CP 351 ("Father shall be solely responsible for booking and paying for the children's transportation for his parenting time, ..."). The father receives a $100 downward monthly credit for this transportation expense obligation. CP 349.

His obligation is adjusted an additional $30 downward in respect of the health insurance he buys for the children through his wife's

employment. CP 349 (totaling $293/month). The court set child support at $910 per month. CP 349; see CP 313 (father requesting it be set at $300). The court also ordered the father to "arrange and pay for family counseling for himself and the children during the summer." CP 350.[3] The mother was ordered to pay the first $250 per year of medical-related expenses, with the parents to split equally additional expenses. CP 355.

Addressing post-secondary support, the order required Kleymeyer to maintain "the children's IRA and educational savings accounts, namely [identifying the four accounts], for the benefit of the children's education," and to "continue to contribute not less than $1,000 per year per child to their accounts," until each turns 18. CP 356. The order requires the father to "pay those funds" toward the children's post-secondary education expenses. CP 356. The father was awarded the tax exemptions. CP 355-356. These two aspects of the agreement (tax exemptions to father for his assuming sole responsibility for post-secondary education) are described as a "buy out" in the pleadings. CP 369; see, also, CP 502-503. "Except as otherwise modified," the other provisions of the 2000 and 2001 orders were to "remain in full force and effect." CP 356.

[3] This case does not directly involve parenting issues, but some background regarding the relationship of the father and the sons is available in the record. See, e.g., CP 361-362, 372-373.

Both children continued to live in Olympia with their mother and half-siblings from April, 2009, until April, 2012. In the spring of 2012, DeVargas and Kleymeyer agreed to allow the older son, B.K., to move temporarily to Los Angeles to live with his father. CP 271, 462. That summer, without an order permitting him to do so, Kleymeyer stopped paying support to DeVargas, for either child, and initiated another modification in the Oregon court (June 29, 2012). CP 343-346, 462.

Concurrently, DeVargas filed a petition to modify in Thurston County, the court waving the filing fee upon a finding that she is indigent. CP 226; 233-243; see, also, CP 250 (asking the court to allow B.K. to return to Olympia if he desires). She also submitted a copy of the Oregon court file. CP 343-446. She explained that B.K. "recently decided to try living with his father in California, as [he] is interested in attending university there." CP 240. She agreed to "give it a shot," despite concerns, and asked the court to consider the child's best interests and to order a temporary change of primary residence for the child. CP 240, 250-251, 268. The parties' written agreement corroborated that this was temporary and contingent. CP 271. The mother's concerns include a claim of abusive use of conflict by the father, posing a risk to the child. CP 245; see, also, CP 263-264, 269. Indeed, their written agreement includes a provision that neither party will seek a change of custody until

after six months (CP 271); the father filed for modification after four months. CP 343-346. He engaged the oldest child in his effort to lower his child support. CP 293-295.

DeVargas, *pro se,* also sought to have the proceedings moved to Washington, since none of the parties or their children any longer reside in Oregon. CP 261, 286-292. In December, 2012, Oregon declined jurisdiction and the modification proceeded in Thurston County. CP 445-446.

The father responded to the mother's petition. CP 447-449. Six months later, he amended his response to request tax exemptions for the children be awarded to him and to modify the 2010 post-secondary education order, "which made the father solely responsible for the costs of post secondary education," by obligating the mother for "no less than one third" of the costs. CP 456.

Motions were filed by both parties in the summer of 2013. CP 461-474, 485-487. Kleymeyer having ceased paying child support in the summer of 2012 (CP 462), DeVargas sought child support according to Washington state guidelines and taking into account Kleymeyer's total economic resources (including his assets and his wife's income). CP 468.[4] She noted that she chose not to seek an order of contempt, despite

[4] It is undisputed Kleymeyer's "spouse has substantial income." CP 790 (Finding of Fact 1.1).

Kleymeyer's failure to comply with the order of support in force at the time. CP 462-63.

Because Kleymeyer had not been employed since leaving his last job at the Rand Corporation in January, 2012, DeVargas argued that his basic support obligation should be calculated using his historical rate of pay ($3,868 per month). CP 465-466. She notes he has a Masters degree and other job skills, but has the ability not to work if he chooses. CP 465. Other evidence indicates he has substantial assets. CP 377 (his trust); CP 389-427 (tax returns); CP 517-518 (2010 Smith Barney state of college savings and investment accounts showing $789,215 held in reserve and $789 033 unreserved); CP 941-955 (tax returns and account statements); see, also, CP 575 (his financial declaration states only $1,500 in available assets).

DeVargas also sought contribution from Kleymeyer for legal defense fees ($14,152.86) she paid on behalf of B.K. when he was accused of theft of a car, and resolution of issues raised by Kleymeyer in his response to her petition, including IRA contribution deductions, health insurance and other medical costs, tax deductions, and transportation costs. CP 462, 468-469. She noted the Oregon court had made provision for the college expenses and that, then and now, she had no resources to contribute to that cause. CP 463. She asked the court to leave in place the

order as to transportation expense, which gives Kleymeyer a $100 monthly credit for paying that expense. CP 470.

There was no dispute that B.K. now lived with Kleymeyer (though he would be entering college that fall and turning 18 three months later), while S.K. lived with DeVargas. DeVargas argued against a child support deviation based on split custody because of the significantly greater resources in Kleymeyer's household and on the fact that less support would work a "significant hardship" on her household. CP 465-466, 468. She noted that, despite support received from her ex-husband, her family has relied intermittently on state assistance since 2009. CP 470. Because of her financial circumstances, with three children in her home and efforts to start a business, she asked for deviation upwards. CP 466, 469-470.[5]

Kleymeyer's motion sought an order of contempt against DeVargas for what he claimed were unreimbursed medical and transportation expenses. CP 486. He included a claim for over $10,000 (including interest) based on travel expenses incurred from 2001-2009, despite those having been dealt with in the 2010 agreed order. CP 486. He claimed "delinquent" medical expense support for 2009, 2012, and 2013, and "for forfeited travel" he blamed on DeVargas for the period

[5] In addition to running a household with four children in it, DeVargas completed a small business training course in 2011 and has slowly been growing her business, in spite of the difficult economy. CP 469-470, 500.

2009-2011. CP 486. He had not raised these issues in his motion to modify filed in the Oregon court. CP 343-345. DeVargas responded that these issues had been addressed in Oregon. CP 505-508.

After two hearings on the parties' motions and an additional six weeks of consideration, Commissioner Jonathon Lack issued a letter ruling and an Order on Show Cause re Contempt/Judgment which awarded to the father medical reimbursements for the period from 2001 to 2013 of $1,574.73 plus interest of $329.94, and long-distance travel expenses for the period 2001 to 2011 totaling $10,002 plus interest of $4,656.64. The findings in the contempt order included that DeVargas had intentionally failed to comply with a lawful order of the court (without specifying which order that was). CP 7. Also included was a finding that DeVargas had the income to pay the judgments. CP 8. The court awarded Kleymeyer $3,000 in attorney fees. CP 6.

In his letter ruling, Commissioner Lack imputed income to Kleymeyer at his historic rate of pay, denying Kleymeyer's requested whole family deviation, apportioning future health care premiums and travel costs, denying a retirement contribution deduction to Kleymeyer, and declining to cap the post-educational costs responsibility at the level of UW tuition. CP 14-15.

DeVargas moved for revision arguing strenuously that any claim to long-distance travel reimbursements had been dealt with in Oregon in 2010. CP 16-48; see, also, CP 489-497. DeVargas objected furthermore to the award of medical reimbursements on the grounds that Kleymeyer had provided no evidence of the costs he allegedly incurred and additionally on the grounds that she had been unable to contribute to various costs for B.K. because she had been receiving no child support at the time. CP 462. She noted Kleymeyer had come to the court with "unclean hands," seeking reimbursement for expenses while at the same time not having met his child support obligations. CP 494-497.

The motion for revision was denied on the grounds that it was untimely. CP 200. (Additional facts related to this issue are included in the argument section.) Judge Anne Hirsch ruled the 10-day window from entry of orders during which motions for revision are to be filed is inflexible; the court does not have the authority to grant extensions of time for any reason. Id. From the bench, the judge expressed concern about the harshness of this rule, but felt her hands were tied. RP (12/13/13) 12; (also CP 219).

DeVargas filed a Notice of Appeal from Judge Hirsch's order. CP 201-206. Three weeks later, Commissioner Lack entered findings of fact

and conclusions of law and a final order on the child support issues. CP 656-671, 672-677. He ruled as follows:

•Kleymeyer had been voluntarily unemployed since January, 2012, and so Income was imputed to him at his historical wage of $3,868.

•Mother was voluntarily underemployed (not working full-time), so income was imputed to her at full-time minimum wage.

•The father's claimed retirement contribution deduction was disallowed.

•The father's requested whole family deviation was denied on the basis of his having significant assets.

•The mother incurred necessary costs for B.K.'s criminal defense, which were to be divided in proportion to income.

•The father was awarded the tax exemptions.

•The father was credited with children's health insurance as a pro rata amount of the family's total insurance payment (i.e., excludes the cost of insurance for the adults).

•Costs for post-secondary education ("all college related expenses" at a private university) were allocated as follows: two-thirds to the parents, to be divided in proportion to income; one-third to the son, whose share could be paid as necessary from the educational account funded by the father under the Oregon order.

•No cap was placed on costs.

•Because no child support had been paid since July, 2012, back support of $16,394.76 was awarded to the mother.

CP 656-671, 672-677. Under the commissioner's calculations, the parents' proportional shares for support purposes were 28% DeVargas and 72% Kleymeyer. CP 667.

The judgment summary included this back support award and the $9,911.20 owing to mother for the legal defense expenses, awarded in the October order. CP 656; see, also, CP 666. The order also mentions the unpaid medical support, per the October contempt order, but does not reference the travel costs judgment from the October contempt order. CP 666.

Both parties sought revision of the final orders. CP 707-714, 715-736, 737-745. After a hearing, DeVargas also lodged objections to the proposed orders. CP 778-787. On February 28, 2014, Judge Lisa Sutton substantially revised the commissioner's ruling as follows:

• Declared Kleymeyer to be "involuntarily unemployed," and determined his income by reference to his unemployment benefits and dividend income (first, as actual income, then as imputed, after his benefits end).

• Allowed Kleymeyer to reduce his income by his voluntary monthly $417 contribution to a Roth IRA.

• Allowed Kleymeyer a credit for the entire health insurance cost, not just a portion attributable to the children.

• Declined to consider the father's household income and assets for purposes of considering the deviation requests.

• Awarded the father a downward deviation for "split custody" without considering the financial circumstances in both households or whether the reduction in support would result in insufficient funds in the mother's household.

• Declined the mother's requested deviation on the basis that the income of the husband's spouse could not be considered.

• Vacated the order requiring the father to contribute to the legal defense funds expended on behalf of B.K.

• Declined to revise the post-secondary education award, as DeVargas requested, and otherwise declined her requested revisions. CP 789-794; see, also, 795-809 810-825, 826-841.

The order wiped out the back support judgment against Kleymeyer and reversed the proportional responsibility of the two parents for the support of the children, with DeVargas, whose income was still imputed at full-time minimum wage, with a proportional share of 61% of income and

Kleymeyer with 39%. Back child support was owed from DeVargas to Kleymeyer for the months since the filing of the action in which each parent had one child. Going forward, Kleymeyer's would owe $50 in monthly support for S.K. The court declined to alter the commissioner's order "with regard to reimbursement for visitation travel expenses ..." CP 793-794.

The mother timely appealed. CP 844-898; see, also, CP 201-221.

IV. ARGUMENT

A. INTRODUCTION

This case involves two appeals. This argument will address the issues raised in those appeals in the following order: claims of error in interpretation and application of the statute in the child support orders entered on February 28, followed by claims of error related to the contempt order entered October 25, 2013, which include a constitutional claim this Court may not need to reach. Ultimately, the numerous errors in the court's orders require reversal and remand for a new proceeding in which all issues are reviewed, since they are interdependent.

B. THE STANDARD OF REVIEW.

Generally, this Court reviews a trial court's child support determination for an abuse of discretion. *State ex rel. J.V.G. v. Van Guilder,* 137 Wn. App. 417, 154 P.3d 243 (2007). However, "[i]f the trial

court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion." *Dix v. ICT Group, Inc.,* 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). That is the problem here.

C. THE COURT VIOLATED THE CHILD SUPPORT STATUTE WHEN IT SET THE FATHER'S INCOME.

Washington child support policy has two goals: to insure support adequate to meet the needs of children commensurate with the parents' income, resources, and standard of living and to equitably apportion that support obligation between the parents. RCW 26.19.001.[6] In other words, the law aims to provide for the child and to do so fairly. The court relieved the father of his obligation when it found him to be "involuntarily unemployed" and determined his income to be what he received in unemployment benefits and dividend income. CP 789, 791; CP 796-797; CP 798, 806 (orders father to pay $50 per child in support as "minimal transfer payment"); CP 812, 822 (orders father to pay $45.50 per child); CP 828, 838. Whether the court was using his actual income, based on

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[6] The statute provides:

> The legislature intends, in establishing a child support schedule, to insure that child support orders are adequate to meet a child's basic needs and to provide additional child support commensurate with the parents' income, resources, and standard of living. The legislature also intends that the child support obligation should be equitably apportioned between the parents.

unemployment benefits and dividend income, or whether the court was imputing income to the father based on those same facts, this action is simply not within the range of choices offered by the statute.

The statute allows that "[i]ncome shall not be imputed for an unemployable parent." RCW 26.19.071(6). However, this provision has been interpreted to mean "not acceptable for employment as a worker." *In re Marriage of Blickenstaff*, 71 Wn. App. 489, 496, 859 P.2d 646 (1993), (quoting *Webster's Third New International Dictionary* 2493 (2d ed. 1969). In Washington, as in other states, this provision has been applied to parents incarcerated (for reasons other than failure to pay child support). *Blickenstaff,* 71 Wn. App. at 497-498 (and cases cited therein). Even then, the court admonishes against excusing even an incarcerated parent from the obligation to support a child if there are other means to meet the obligation. *Id.,* at 498. As the court observed, "[t]o hold otherwise would thwart a major purpose of the child support statute, which is to 'insure that child support orders are adequate to meet a child's basic needs . . ..'" *Id.*, *citing* RCW 26.19.001. "A parent should not be allowed to avoid a child support obligation by voluntarily remaining in a low paying job, or by not working at all." *In re Marriage of Foley*, 84 Wn. App. 839, 843, 930 P.2d 929, 931 (1997) (emphasis added).

Here, the father was not unemployable, nor did the court find that he was.[7] The court found he was "involuntarily unemployed," based on his being terminated from his job at Rand Corporation and his receipt of unemployment benefits. CP 789, 791. First, it bears noting that the father made no effort to demonstrate he was unemployable. Being terminated from your job does not mean you cannot work. Nor were the circumstances of his termination particularly illuminating. CP 597. It appears his employer's claims management analysts thought Kleymeyer perfectly capable of returning to work. Kleymeyer said his physician disagreed. (This appears in the record as triple hearsay; there is nothing from the physician.)

In any case, lots of people lose their jobs and lots of people qualify for unemployment benefits. These people are not unemployable. If a parent is employable, but unemployed, the statute presumes the unemployment is voluntary and requires that income be imputed at full-time employment. RCW 26.19.071. There is no authority for the trial court to do otherwise. This legal error requires reversal.

Even if reversal was not already required, the court also erred when it established income for the father at his dividend income and

[7] According to his resume, Kleymeyer is tri-lingual, has a Masters degree, is a published author and investigator, a project coordinator, a fundraising consultant, an administrative assistant; he has significant employment skills and qualifications. CP 465, 957-958.

unemployment benefits. The statute directs the court specifically in how to impute income. RCW 26.19.071(6). The preferred means is by resort to historical income data (i.e., "full-time earnings at the current rate of pay" or "full-time earnings at the historical rate of pay based on reliable information" or "full-time earnings at a past rate of pay where information is incomplete or sporadic"). RCW 26.19.071(6)(a-c). Here, the father had been recently and gainfully employed by the Rand Corporation. His historical rate of pay was known. Properly, his income should have been set at that level.

However, the court based his income on his unemployment benefits and his dividend income. (The court imputed income at these levels going forward, since the father's unemployment benefits terminated in 2013. CP 789, 791.) These are not proper bases under the statute, even if the father's historical rate of pay could not have been calculated. Rather, in those circumstances, the statute directs the court to use census data to impute income, considering the individual's circumstances. RCW 26.19.071(6)(e). By doing other than as directed by the statute, the court abused its discretion. *In re Marriage of Littlefield,* 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997) (discretion abused if based on untenable reasons, meaning based on an incorrect legal standard or facts do not fit requirements of correct standard).

Because the support orders turn on these errors, they must be vacated in their entirety and the determinations undertaken anew based on correct application of the statute.

D. THE TRIAL COURT ERRED WHEN IT DENIED THE MOTHER'S REQUESTED DEVIATION.

The mother requested a deviation based on the father's household wealth and based on the fact of her having two additional children to support in her own household. The court denied on the first basis, explaining "only the father's income is to be used in calculating any support obligation." CP 798, 813, 829. The court denied also without considering the additional children in the mother's household. Both of these are legal errors.

Washington law requires that the parties must disclose and the court must consider "all income and resources of each parent's household." RCW 26.19.071(1). Here, the trial court did just the opposite; it seemed to think it could not consider the father's household wealth, but that is plainly erroneous. In fact, among the nonexclusive list of reasons for deviating from the standard calculation is wealth, as well as income of a new spouse. RCW 26.19.075(1)(a)(i & vi). Moreover, wealth accumulated from the income of a new spouse may justify deviation. *Brandli v. Talley*, 98 Wn. App. 521, 525, 991 P.2d 94, 97 (1999). Certainly, in deriving the standard calculation, the court must look

exclusively to the income of the parents, not others in the household. RCW 26.19.071(1). See CP 791 (court concluding: "[t]he income of the Respondent father's spouse is not by law included in his income calculation."). But that does not end the inquiry. Rather, "the court must consider the income and resources of the parents, as well as their spouses, before deciding whether to deviate from the basic support obligations." *Brandli v. Talley*, 98 Wn. App. 521, 524, 991 P.2d 94, 96 (1999). Indeed, the statute expressly mandates this. RCW 26.19.075(2).[8]

At the end of the day, the critical question is the effect on the children. The court must inquire as to "how all involved parents' circumstances affect the children's needs." *In re Marriage of Choate*, 143 Wn. App. 235, 243, 177 P.3d 175, 178 (2008). The court committed legal error in holding that it could not consider the father's household wealth. In fact, it was mandatory.

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[8] The statute provides, in pertinent part:

> (2) All income and resources of the parties before the court, new spouses or new domestic partners, and other adults in the households shall be disclosed and considered as provided in this section. The presumptive amount of support shall be determined according to the child support schedule. Unless specific reasons for deviation are set forth in the written findings of fact and are supported by the evidence, the court shall order each parent to pay the amount of support determined by using the standard calculation.

RCW 26.19.075

It is also mandatory that the father disclose all assets and income. His financial declaration lists only $1,500 in "available assets," but a 2013 Chase statement shows $8,400 on deposit (CP 951) and his 2012 Form 1040 indicates over $7,000 in dividend income, nearly $29,000 in capital gains, and over $5,000 in partnership income. CP 946. He has $36,000 (rounded) in a Rand retirement account and over $80,000 in a Morgan Stanley account. CP 952, 954. He also claims mortgage interest. CP 947. Other wealth is indicated in the record. CP 941-955. The point is that a parent must disclose all sources of income and the court must consider all assets. The Oregon court noted Kleymeyer's recalcitrance in the first regard and, here, the trial judge declined to consider the father's wealth. *In re Marriage of Bucklin*, 70 Wn. App. 837, 855 P.2d 1197 (1993).

The court also failed to consider the two other children in DeVargas's household, which also violates the statute. RCW 26.19.075(1)(e) permits the court to deviate if a parent has "children from other relationships to whom the parent owes a duty of support." When the parent requests a deviation on this basis, the court must at least consider the entirety of the circumstances, i.e., "the total circumstances of both households..." *State ex rel. J.V.G. v. Van Guilder,* 137 Wn. App. at 427. The purpose and focus of this inquiry is, properly, the child's basic needs. *Id.* For example, in *Choate, supra,* this Court held it was error for the trial

court to grant a downward deviation based on the addition of a child to the father's household without considering income of the other parent in that household. See, also, § E below. Similarly, here, the court lent great significance to the fact that one child spent most of his last year as a minor in his father's home, but ignored the fact that the mother had three other minor children in her home. While this concern should be front and center, it was not; the analysis went off the rails and the result cannot be squared with the purposes of the child support statute. The order should be vacated and the case should be remanded with instructions to consider all the relevant circumstances in respect of the mother's and father's requested deviations. See, also, § E below. .

E. THE TRIAL COURT ERRED WHEN IT GRANTED THE FATHER'S REQUESTED DEVIATION BASED ON SPLIT RESIDENTIAL TIME (THE "ARVEY" DEVIATION).

The court granted the father's request for a deviation based on the fact that the eldest son moved to the father's residence in the year before he began his undergraduate education. He argued the court should apply the formula used in *In re Marriage of Arvey,* 77 Wn. App. 817, 894 P.2d 1346 (1995). In *Arvey,* one panel of Division One derived a different means of calculating the basic support obligation when each parent provides primary residential care to one or more of the family's children ("split residential time"). A different panel reached a different conclusion,

agreeing that the statute did not seem to contemplate such an arrangement but declining to intrude upon the legislature's function. *In re Marriage of Oakes,* 71 Wn. App. 646, 861 P.2d 1065 (1993).

The trial court treated the father's request as one for deviation, which harmonizes with Washington law on shared residential arrangements. *See, State ex rel. M.M.G. v. Graham,* 159 Wn.2d 623, 633, 152 P.3d 1005 (2007). In *M.M.G.,* the court said the legislature chose to deal with such arrangements by means of the downward deviation and the "residential credit," citing RCW 26.19.075(1)(d)). M.M.G. makes clear, as does the statute, there is no other means to avoid the application of the standard calculation than by deviation.

The deviation analysis is structured by the statute, which, pertinently, prohibits a downward deviation if it results in insufficient funds in the household receiving support. RCW 26.19.075(1)(d). That is precisely the result achieved here by the court's granting of the father's request. The court lost sight of the main event: meeting the child's needs. *See, e.g., In re Marriage of Casey,* 88 Wn. App. 662, 967 P.2d 982 (1997) (children reside primarily with father but mother's poverty justifies deviation requiring father to pay support during summers when child lives with mother and to pay transportation expense). Whether or not B.K. lived with his father for a time, nothing substantial changed in the

mother's household such that she could still meet S.K.'s needs on a fraction of the support. Nowhere does the court address the problem of leaving the mother's household with insufficient funds. CP 790-793. Because of this error, the order should be vacated and the cause remanded for entry of a child support award either at or above the standard calculation.

F. THE TRIAL COURT ERRED WHEN IT ORDERED THE MOTHER TO PAY FOR PRIVATE COLLEGE EDUCATION WHEN SHE HAS NO ABILITY TO DO SO.

It is axiomatic that "a parent obligated to support his or her minor children cannot be deprived of adequate money to meet those obligations, in favor of supporting adult children through college." *In re Marriage of Shellenberger,* 80 Wn. App. 71, 84, 906 P.2d 968 (1995). Yet, here, the trial court seemed not to know that a parent's financial situation was a critical part of the analysis. Here, the mother has three dependent children in her home, yet has been ordered to pay twice her yearly income to support the eldest child in private college. This cannot be right.

The commissioner ordered the mother to pay one-third of all college related expenses for the oldest son. The judge denied the mother's motion to revise the commissioner's ruling and entered child support orders accordingly. CP 793, 800, 815, 831. None of this makes sense. From the worksheets, it does not appear that either of these parents can

afford to pay post-secondary education expense. The father seems to have argued that his obligation for his minor child should be reduced because he is supporting his older child through college. That argument turns Washington law upside down. As this Court has explained:

> Where the trial court must choose between the higher education needs of an adult child and the support needs of a minor child, the needs of the minor child should weigh more heavily. Where a family is of modest means, parental desire to provide adult children with a free college education simply may not be realistic.

Shellenberger, 80 Wn. App. at 84 n.10. Supporting a minor child is mandatory; supporting an adult child through school is optional. Here, the oldest child is being supported at the level of approximately $4000/month, while the youngest child's basic support obligation is set at $577. CP 805. Obviously, something is amiss.

There is a big difference between child support for minor children and child support for adult children. The former is a mandatory obligation. *Amunrud v. Bd. of Appeals,* 158 Wn.2d 208, 223, 143 P.3d 571 (2006). However, assisting a child obtain a child education "will not be a duty of support of all parents, but is circumstantial ..." *Childers v. Childers,* 89 Wn.2d 592, 600, 575 P.2d 201 (1978). That is, "[i]t is not the policy of this State to require divorced parents to provide adult children with a college education in all circumstances." *Id.* Rather, "a parent may

have a duty of support for college education if it works the parent no significant hardship and if the child shows aptitude." *Id.,* at 601.

The problem here lies in all the erroneous rulings leading to the entry of these orders, including, prominently, the discounting of the father's wealth. The parties present with vastly different financial circumstances: the father has wealth, a residence, substantial investment assets, a trust fund, and working spouse and no minor children in the home, the mother has no house, no wealth and no second income and three minor children. The court treated these people as if these facts did not exist. In fact, the order violates the statutory cap on what a court may require a parent to pay. RCW 26.19.065; see CP 743.

The Oregon court seemed to recognize the difference and ordered only the father to set aside money for the children's college education. The father acknowledged the order "made [him] solely responsible for the costs of post secondary education." CP 456. Yet, here the court ordered the mother to pay the lion's share of all expenses related to her eldest son attending a private university. Certainly, the court avoided any analysis of the mother's ability to pay and made no findings on the question. Such is the case here. The court's lack of findings on this point is itself problematic. *Shellenberger,* 80 Wn. App. at 84. Altogether, the result cannot be squared with Washington law.

G. THE TRIAL COURT ERRED WHEN IT DID NOT REQUIRE THE FATHER TO CONTRIBUTE TO THE LEGAL DEFENSE EXPENSES INCURRED ON BEHALF OF THE OLDEST SON.

In 2011-2012, the oldest son got into some legal difficulties and the mother had to hire a lawyer for him, at a substantial cost to her. CP 266, 301-304. Arguably, the father's involvement drove a large part of that expense. Id. The commissioner ordered the father to contribute to that effort, but the trial judge revised holding:

> There is no basis in case law or statute for the Respondent father to be found obligated to pay criminal defense fees for a child of a committed intimate relationship when a parentage decree has been filed years before those fees were incurred, the mother was the custodial parent of the child and the father did not assume an obligation for those fees.

CP 791. However, statute provides that "special child rearing expenses … shall be shared by the parents in the same proportion as the basic child support obligation." RCW 26.19.080.[9] The statute expressly addresses health care and day care, but does not confine relief to those subjects. *See, e.g., In re Marriage of Katare,* 125 Wn. App. 813, 105 P.3d 44 (2004); *Van Guilder, supra* (private school tuition). The only limitation is that the expenses must be necessary and reasonable. RCW 26.19.080(4). Here, the trial court said it could not order these expenses to be shared, and included as a reason the fact that the parents of the children were not

[9] This proportional rule may be altered if a deviation is ordered in the basis support. *In re Marriage of Casey,* 88 Wn. App. 662, 967 P.2d 982 (1997).

married to one another, which is contrary to Washington law's mandate of equality for treatment of children regardless of their parents' marital status. RCW 26.26.106 (child has same rights regardless of whether parents married). In fact, the trial court "has discretion to determine whether extraordinary expenses are reasonable and necessary child-rearing expenses in its order of child support." *In re Matter of Yeamans,* 117 Wn. App. 593, 599, 72 P.3d 775 (2003). Here, reversal is required on this basis because the trial court applied the incorrect legal standard. *See Littlefield, supra.*

H. THE TRIAL COURT ERRED WHEN CREDITED THE FATHER FOR HEALTH INSURANCE PAID FOR HIMSELF AND HIS SPOUSE.

The father covers the children with health insurance provided through his wife's employment. CP 674. He claimed the insurer did not apportion the amount paid for the children versus the amount paid for the adults. RP (09/10/13) 13-15. Nevertheless, the commissioner did so, crediting the father accordingly only for the "actual expense" paid for the children. CP 675. The trial judge revised this and credited the father for the entire amount. This is error since insurance for the father and his wife simply is not a child support expense.

I. THE TRIAL COURT ERRED BY CREDITING THE FATHER FOR VOLUNTARY CONTRIBUTIONS TO A ROTH IRA.

Despite relying on his unemployment to seek a lower child support obligation, the father contributed $417 (rounded) to a Roth IRA. The commissioner disallowed this savings in his calculations "because the father provided no evidence of retirement account contributions made over the prior two years[.]" CP 676; see, also, CP 722-723' RP (01/07/14) 7 (finding "no evidence"). The trial court revised and allowed the father this deduction. CP 791. While RCW 26.19.071(5)(g) permits the deduction from gross monthly income a parent's actual voluntary retirement contributions, the deduction is not permitted if "the contributions were made for the purpose of reducing child support ..." Accordingly, the parent must "show a pattern of contributions during the one-year period preceding the action ..." *Id.* That did not happen here. Rather, the father has a history of obscuring his assets and income in order to avoid his obligation. He is able to make a retirement contribution presumably because he has substantial household income (in the $124,000-154,000 range for 2011 and 2012, CP 942, 944) and a trust fund. But, as the commissioner noted, he started making these contributions when this litigation began. He asked the Oregon court to disregard his trust fund because he was saving it "for his own retirement." CP 377. The father's efforts to isolate his substantial wealth from the obligation to support his

children do not comport with Washington law, especially where the mother requested a deviation on the basis of his household wealth and her household poverty. The court abused its discretion in allowing him this deduction.

J. THE COURT IMPROPERLY DENIED REVISION OF THE CONTEMPT ORDER.

1) The transportation expense was res judicata.

The order at issue here involves tens of thousands of dollars, including more than ten thousand awarded by the Washington court after being denied by the Oregon court, which made the father responsible for the visitation travel expenses. CP 349, 351. Not only was this part of the parents' agreement in 2010, it makes sense, since the father arranged for travel all over the world and many other issues were resolved altogether in the 2010 order. In any case, the father's claim to the Washington court was either res judicata or collaterally estopped, or both. *Christensen v. Grant County Hospital*, 152 Wn. 2d 299, 307, 96 P. 3d 957 (2004); *Robinson v. City of Seattle*, 119 Wn.2d 34, 82, 830 P.2d 318 (1992). The father's attempt to re-litigate this issue in the Washington courts is precisely the kind of conduct the preclusion doctrines seek to curtail.

2) The order of contempt was erroneous.

The court's contempt power is to be used with great restraint. *Daly v. Snyder,* 117 Wn. App. 602, 606, 72 P.3d 780 (2003) *rev. denied,*

151 Wn.2d 1005 (2004). Among the constraints on the court's contempt power is a requirement that the order allegedly violated must be crystal clear in what it requires. That is, in contempt proceedings, an order will not be expanded by implication beyond the meaning of its terms and the order must be clear and specific so that party knows when the order is exceeded or violated. *Johnston v. Beneficial Management Corp of America,* 90 Wn.2d 708, 713-14, 638 P.2d 1201 (1982). Washington applies a "strict construction" rule for interpreting judicial decrees, violation of which provides the basis for contempt proceedings. *Graves v. Duerden*, 51 Wn. App. 642, 754 P.2d 1027 (1988). The facts found must constitute a plain violation of the order. *Graves v. Duerden*, 51 Wn. App. at 647-48.

In this case, the commissioner's order on contempt does not even identify the order purportedly violated. CP 7 (finding DeVargas "intentionally failed to comply with a lawful order of the court dated on [left blank]"). On its face, this cannot be valid. Here, especially, where the child support order in effect, the 2010 Oregon order, specifically declares "[f]ather will continue to pay all of the children's transportation expenses for his parenting time in the amount of not less than $3,600 per year." CP 349 (emphasis added); see, also CP 351 ("Father shall be solely responsible for booking and paying for the children's transportation for his

parenting time, ..."). DeVargas was not in contempt. She had no obligation to pay transportation expense.

The commissioner also found DeVargas "had the ability to comply with the order as follows: She had received funds in another divorce action, she is capable of earning income." CP 7-8. This finding cannot be squared with the trial court's previous finding that the mother was indigent for purposes of the filing due for her petition to modify. CP 225-230. In fact, the mother showed the divorce settlement funds had been expended in relocating from Scotland and that she was in the process of starting a business, as well as raising her four minor children. This finding of the commissioner's lacks any foundation in the evidence and violates the governing statute. RCW 26.18.050(4). In fact, the contempt order threatens to plunge the mother's household into poverty.

3) The court erroneously ordered fees.

The contempt order includes an award of attorney fees to the father. CP 6. This award is available only to the obligor. RCW 26.18.160. It must be justified by a finding that the obligee spouse brought the action in bad faith. *Id.* That is not the case here. This, too, is error. *In re Marriage of Cummings*, 101 Wn. App. 230, 6 P.3d 19 (2000).

4) The order of contempt was not ripe for revision.

The family court commissioner took up all the matters at a hearing on August 20, 2013, which resulted in an oral ruling addressing some, but not all, of the issues. CP 612. At that time, the mother's attorney indicated his intent to withdraw. RP 30-31.

At a hearing on September 10, 2013, the court heard additional argument and took the matter under advisement, noting that it had "gotten a little too complex." CP 3; RP (09/10/13) 26. The mother's attorney made a limited appearance for purpose of that hearing only. RP (09/10/13) 3.

Six weeks later, the court entered a letter ruling and an order on contempt. CP 6-13, 14-15. The court did not enter findings and conclusions or a final order of child support until January 7, 2014. CP 672-677, 656-671.

Though the mother's attorney had advised the court of his withdrawal, the court sent the attorney a copy of the letter ruling, mailing it four days after entry (i.e., October 29). CP 46-48, 58-60. The attorney received the correspondence on November 4, the tenth day after entry. CP 54. The mother, pro se, filed a motion for revision four days later. CP 16-48. Judge Hirsch denied the motion on the basis it was untimely and the court did not have the "inherent authority" to consider a motion filed

outside the ten-day time limit. CP 200. DeVargas appealed this order. CP 201-206.

This appeal raises a constitutional challenge to the application of the ten-day rule to the facts of this case. Argument in support of that challenge appears below. However, as a preliminary matter, it appears the commissioner's order on the father's motion for contempt had the effect of improperly bifurcating the proceedings, since the main event remained to be determined: i.e., the motions re child support and parenting. The child support order and findings of fact and conclusions of law pertaining to these matters were not entered until January 7, 2014, from which the mother (and the father) timely sought revision. Here, the mother takes the position that the right to revision attached to the commissioner's last act, and brought up for revision those related actions, including the order on contempt.

This only makes sense, both in terms of avoiding piecemeal litigation and in terms of what revision means. A motion for revision is similar to an appeal, which makes of the contempt order an interlocutory order. "[I]n the interests of speedy and economical disposition of judicial business" interlocutory appeals are to be avoided. *Minehart v. Morning Star Boys,* 156 Wn. App. 457, 462, 232 P.3d 591 (2010).

Application of this principle here makes even more sense when considered along with the fact of the letter ruling, which identifies the many other issues yet to be finalized. This letter ruling does not have the effect of an order, under the reasoning of *In re Marriage of Tahat,* 2014 Wash. App. LEXIS 1882, 2014 WL 3778169 (Wash. Ct. App. July 31, 2014). There, the court held a letter ruling did not have the effect of starting the clock on a motion to reconsider because it did not comply with the presentation requirement of CR 54(f) and is not a "judgment, order, or other decision" under CR 59(b).

Finally, the trial court has the inherent authority to do equity, especially in matters concerning children. *In re Parentage of L.B.,* 155 Wn.2d 679, 708, 122 P.3d 161 (2005), and that is what these facts called for. The ten-day rule contemplates that parties are present when the judgment is declared and court rule and convention require it be entered simultaneously. None of that happened here. What did happen effectively renders meaningless the right to revision. That cannot be right and, if nothing else, the court has the power to do right. The court has broad equitable powers in family law matters. *In re Marriage of Morris*, 176 Wn. App. 893, 903, 309 P.3d 767, 773 (2013). And "[t]he legislature by statute cannot alter the constitutional jurisdiction of the superior courts." *State v. Posey*, 174 Wn.2d 131, 140, 272 P.3d 840, 845 (2012).

Here, the court deferred without inquiry to the statute, as interpreted by he court relied on *In re Marriage of Robertson*, 113 Wn. App. 711, 54 P.3d 708 (2002), which holds the superior court cannot extend the time for filing a revision motion beyond the ten days identified in RCW 2.24.050.[10] In addition to the problems discussed above, the problem with applying *Robertson* here is that it violates DeVargas's constitutional rights.

The right to have your case heard by a superior court judge is a substantial right, enshrined in both constitution and statute. Const. art. IV, § 23; RCW 2.24.010 *et seq.*[11] Thus, the right to revision is "of constitutional magnitude …". *State v. Wicker,* 105 Wn. App. 428, 432, 20 P.3d 1007 , 1008 (2001). Indeed, the right to revision is broader than the right to appeal. *Wicker, supra.* The superior court's power to review a

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[10] The statute provides:

> All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court. Any party in interest may have such revision upon demand made by written motion, filed with the clerk of the superior court, within ten days after the entry of any order or judgment of the court commissioner. Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner, and unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and become the orders and judgments of the superior court, and appellate review thereof may be sought in the same fashion as review of like orders and judgments entered by the judge.

[11] RCW 2.24.050 provides, in pertinent part, as follows: "All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court."

court commissioner's order is essentially unlimited, encompassing full jurisdiction "to conduct whatever proceedings it deems necessary to resolve the matter." *In re Dependency of B.S.S,* 56 Wn. App. 169, 171, 782 P.2d 1100, 1101, *reconsideration denied, review denied* 114 Wn.2d 1018, 791 P.2d 536 (1989). In other words, it is of the same order as the right to go to court in the first place, the right to due process.

Here, the court deemed the clock began to run when the letter ruling and order of the commissioner appears on the docket. Certainly, CR 58, provides that judgment is "deemed entered for all procedural purposes from the time of delivery to the clerk for filing, ..." However, even this clear, bright line presupposes the clerk actually files the document, as opposed, for example, to losing it. *See Malott v. Randall*, 83 Wn.2d 259, 517 P.2d 605 (1974). In *Mallott*, the clerk placed the court's order in a drawer, rather than in the court file. The Supreme Court held the order was not entered until it was placed in the court file, which is the date from which the appellate filing deadline was properly calculated. *Id.,* at 262. Even though the parties were present when the court signed the orders, the Supreme Court declared the importance of the actual filing, noting that the point was to make certain interested parties would know when entry occurred. *Id.,* at 262-263.

That same concern presents here, if anything, more acutely. The parties were not present when the court signed the order, six weeks after the hearing. They could have no inkling when the court commissioner might issue a ruling and could not, without checking with the clerk's office every single day for whatever indefinite period, learn about the order's entry. Even then, given the clerical realities, a document presented to the clerk for filing often takes days to appear in the actual court file or on the docket. Given these facts, certainly as they unfolded here, the right to revision is utterly eviscerated by the trial court's reading of the ten-day requirement. Accordingly, the court should have invoked its authority under CR 6(b) to enlarge the time in which DeVargas could file her motion for revision.

Any other result is inconsistent with Washington's intended treatment of those who petition the court for relief. This policy requires that rules be applied in a sensible manner. Indeed, our courts have repeatedly declared

> It is a well-accepted premise that "[l]itigants and potential litigants are entitled to know that a matter as basic as time computation will be carried out in an easy, clear, and consistent manner, thereby eliminating traps for the unwary who seek to assert or defend their rights."

Christensen v. Ellsworth, 162 Wn.2d 365, 372, 173 P.3d 228 (2007). Read this way, the rule is arbitrary and capricious, effective at limiting

motions for revision, but ineffective at fulfilling the constitutional mandate.

Even minimal due process requires effective notice. *In re Pers. Restraint of Grantham*, 168 Wn.2d 204, 227 P.3d 285 (2010). The importance of the revision right requires that its implementation be fundamentally fair, to comport with due process. U.S. Const., amend. XIV; Wash. Const., art. 1 § 3.

This matters especially here because the contempt order is wrong on so many counts, as discussed above. Applying the 10-day rule inflexibly to the facts of this case makes a mockery of the right to revision. The rule cannot be understood to require a litigant to sit in the courtroom for six weeks while a commissioner contemplates a ruling. Or to annoy the court clerk with daily phone calls. Or even to watch the docket every day, which would be ineffective in any sense, since the actual docketing of a document can lag well behind its entry. For the reasons above, this Court should determine that the contempt order was not ripe for revision until final orders were entered on January 7, 2014, and therefore it should have been addressed on the subsequent revision. Or this Court should hold that the ten-day rule is unconstitutional as applied to the facts of this case and the court has inherent authority to permit revision. As a practical matter, the only sensible solution is to take up the back support/expense

issues altogether with the other issues, as should have been done in the first place.

V. MOTION FOR ATTORNEY FEES

DeVargas seeks attorney fees based on her need relative to Kleymeyer's ability to pay on the authority of RAP 18.1 and RCW 26.09.140. The statute provides that:

> The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection there with, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

This statute has as its purpose "to make certain that a person is not deprived of his or her day in court by reason of financial disadvantage." 20 Kenneth W. Weber, Wash. Prac., *Family and Community Property Law* § 40.2, at 510 (1997). It is hard to dispute that a parent with vastly inferior resources "is at a distinct and unfair disadvantage in proceedings" pertaining to a child. *King v. King,* 162 Wn.2d 378, 417, 174 P.3d 659 (2007) (Madsen, J., dissenting). DeVargas is vastly disadvantaged in this litigation, precisely the kind of parent who is the subject of the statute's concern. Accordingly, she requests her fees.

VI. CONCLUSION

For the foregoing reasons, Amy DeVargas respectfully asks this Court to vacate the orders described above and remand for a new trial on all issues and with entry of orders in compliance with applicable law, including RCW 26.21A.550, which governs modification of child support orders issued in another state. *In re Marriage of Schneider*, 173 Wn.2d 353, 363, 268 P.3d 215, 220 (2011), She asks further to be awarded attorney fees on appeal.

Respectfully submitted this 15th day of September 2014.

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